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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ANTHONY R. SCHUBERT,

Petitioner

v.

RICHARDSON SECURITIES OF CANADA,
GEORGE T. RICHARDSON, Sen. Partner
FRANK B. LAMONT, Partner
W. H. LORNE ROLSTON, Partner
RICHARDSON SECURITIES, INCORPORATED,

COMMODITY EXCHANGE, INCORPORATED,

COMMODITY FUTURES TRADING COMMISSION,

Respondents

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Anthony R. Schubert,
Pro Se Petitioner
120 West 5th Avenue
Hutchinson, Ks. 67501
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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Second Circuit Court of Appeals affirms an interpretation of the Commodity Exchange Act that disregards legislative intent, conflicts with the common law of New York and is inimical to the public interest:

A. Whether the Commodity Exchange, Inc. has legal authority and a duty, under the public interest standard in the Commodity Exchange Act, Secs. 3, 5(g), 7 U.S.C. Secs. 5, 7(g), and under the common law of the State, to regulate the fair practice of its members off-Exchange (Opin., CCH Comm. Fut. L. Rep. Para. 21,476, pages 26,227, 26,231; Appendix at 3, 11-12).

B. Whether the Commodity Futures Trading Commission properly refuses to enforce the statutory public interest stan-

dard for contract markets, and properly is immune to suit under the Tort Claims Act for its refusal, 28 U.S.C. Sec. 1346(b) et seq., Commodity Exchange Act, Sec. 5(g), 7 U.S.C. Sec. 7(g) (App. at A-3-4, A-10, A-24).

II.

Whether in this pro se case the Second Circuit Court of Appeals sanctions a standard of finding of fact and law which erodes the integrity of the Federal courts:

A. Whether the refusal of the Second Circuit to allow amendment of complaint conflicts with decisions of this Court and of other Circuit Courts of Appeal, and with decisions of the New York Supreme Court (App.at A-4, A-13-15).

B. Whether Richardson Securities of Canada was fully and explicitly autho-

rized to sell gold futures contracts and properly executed the sales for Schubert (App. at A-2-3, A-18-20).

C. Whether the issues of negligence and breach of contract in the case against Richardson are identical (Trial Trans., Document on Appeal No. 107 at 214-215; Brief, Doc. No. 96 at 10-12, 18-25).

PARTIES TO THE PROCEEDINGS

All parties to this case are constituted and named as stated in the caption, except that the Canadian partnership, Richardson Securities of Canada, has been dissolved and re-established as Richardson Greenshields Securities of Canada, Ltd., a Canadian corporation. The wholly owned New York subsidiary corporation and agent of Richardson, named Richardson Securities, Inc., in the caption, is currently incorporated in New York as Richardson Greenshields Securities, Inc.

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CITATIONS OF COURT OPINIONS IN THIS CASE

1. United States Court of Appeals for the Second Circuit:

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2. United States District Court, Southern District of New York:

   Opinion and Order of Sept. 24, 1982, CCH Comm. Fut. L. Rep. Para. 21,476, p. 26,227; not published in F.Supp.

PRAYER FOR WRIT

The petitioner Anthony R. Schubert respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 25, 1985.

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JURISDICTIONAL GROUNDS

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), for review of the above-mentioned Second Circuit judgement of March 25, 1985.

UNITED STATES STATUTES INVOKED

Commodity Exchange Act, As Amended:

"Sec. 3. Transactions in commodities involving the sale thereof for future delivery as commonly conducted on boards of trade and known as "futures" are affected with a national public interest. Such futures transactions are carried on in large volume by the public generally and by persons engaged in the business of buying and selling commodities and the products and byproducts thereof in interstate commerce. The prices involved is such transactions are generally quoted and disseminated throughout the United States and in foreign countries as a basis for determining the prices to the producer and the consumer of commodities and the products and byproducts thereof and to facilitate the movements thereof in interstate commerce. Such transactions are utilized by

shippers, dealers, millers, and others engaged in handling commodities and the products and byproducts thereof in interstate commerce as a means of hedging themselves against possible loss through fluctuations in price. The transactions and prices of such commodities on such boards of trade are subject to excessive speculation and can be manipulated, controlled, cornered, or squeezed, to the detriment of the producer or the consumer and the persons handling commodities and the products and byproducts thereof in interstate commerce, rendering regulation imperative for the protection of such commerce and the national public interest therein. Furthermore, transactions which are of the character of, or are commonly known to the trade as, "options" are or may be utilized by commercial and other entities for risk shifting and other purposes. Options

transactions are in interstate commerce or affect such commerce and the national economy, rendering regulation of such transactions imperative for the protection of such commerce and the national public interest."

* * * * * * *

"Sec. 5. The Commission is hereby authorized to designate any board of trade as a "contract market" when, and only when, such board of trade complies with and carries out the following conditions and requirements:

* * *

(g) When such board of trade demonstrates that transactions for future delivery in the commodity for which designation as a contract market is sought will not be contrary to the public interest."

Tort Claims Act, 28 U.S.C. Sec. 1346(b) et seq:

"Sec. 2680. Exceptions
The provisions of this chapter and section 1346(b) of this title shall not apply to--

(a) Any claim based on an act or omission of any employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based on the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

FEDERAL REGULATIONS INVOKED

General Regulations of the Commodity Futures Trading Commission under the Commodity Exchange Act:

"Reg. Sec. 166.2. Authorization to Trade. No futures commission merchant or associated person may directly or indirectly effect a transaction in a commodity interest for the account of any customer unless before the transaction the customer, or person designated by the customer to control the account--

(a) Specifically authorizes the futures commission merchant or associated person to effect the transaction (a transaction is "specifically authorized" if the customer or person designated by the customer to control the account specifies (1) the precise commodity interest to be purchased or sold and (2) the exact amount of the commodity interest to be purchased or sold); or

(b) Authorized in writing . . ."

STATEMENT OF CASE

Federal jurisdiction in the United States District Court, Southern District of New York, is based on diversity of citizenship, under 28 U.S.C. Sec. 1332, Schubert being a citizen of Kansas; the Richardsons citizens of the Province of Manitoba, Canada; Richardson Securities, Inc., and the Exchange New York corporations; and the Commission a Federal Government agency.

Schubert maintained a commodity trading account with Richardson Securities of Canada from March to December, 1979.

Richardson is a member of the Commodity Exchange, Inc., New York, by its subsidiary, Richardson Securities, Inc.

The opinion of the Second Circuit that the Exchange has no legal duty to regulate

member practice off-Exchange (App. at A-3, 10-13) conflicts with Notice of the Commission dated December 23, 1976, which states that duty for contract markets, including the Exchange, 41 F. R. 56134, CCH Comm. Fut. L. Rep. Para. 20,242, at 21,287, 21,288 (App. at A-25).

The Exchange does not in fact regulate member practice off-Exchange, in violation of Sec. 5(g), CEA (Brief, Counsel for the Exchange, dated Sept. 15, 1981, Docu. on Appeal No. 16 at 5-7; Brief on Appeal dated January 10, 1985, at 9-10).

The Commission by its failure to enforce the public interest standard for the designation of contract markets is in violation of the Statute, Sec. 5(g), 7 U.S.C. Sec. 7(g) (Notice, App. at A-25-26).

The Second Circuit Court upholds the dis-

missal, under the exception in 28 U.S.C. 2680(a), of the case against the Commission under the Tort Claims Act, alleging breach of Sec. 5(g) of the Statute, the public interest standard for designation of contract markets (Opin., App. at A-3-4, 10).

Richardson commodity broker, Neufeld, was registered with the Commission, and was governed in the transactions at issue by Commission Reg. Sec. 166.2 "Authorization to Trade", and knew of and relied on provision in the Rule which allows executions without the exercise of due care (Depo., Doc. No. 87C at 78-79, 83).

The Second Circuit Court sanctions finding of fact by the District Court in final judgment, May 3, 1984, that Richardson suggested adding some two dollars to previous closing prices, in the futures con-

tracts at issue, and entering orders, and that Schubert agreed, (App, at 2-3, 19-20, Trans., Docu. No. 107, p. 296-297).

The Richardson defense depends on that allegation.

Richardson based the allegation on the statements of its commodity broker, Neufeld, purportedly made before the market opened on the morning in question (Richardson ltr. of Apr. 27, 1979, Schu. Exhib. No. 7, Rec. on App.; cited as Exhib. No. 5 in Tr. Trans.).

Neufeld did in fact add some two dollars to previous closing prices, before the market opened and enter sales orders for Schubert's account, without authority according to Schubert.

It was apparent before the market opened and before the orders were entered that

this procedure was a mistake. The procedure was in fact a mistake, which caused Schubert a loss on the transactions of $15,240. Neufeld had reason to disclaim responsibility for the mistake (Depo., Docu. No. 87C at 38, 46-60).

In sworn testimony at trial, Neufeld stated that when he makes similar trades for his own account, he does not use the procedure he used for Schubert's account (Trans., Docu. No. 107 at 118-119).

There is inconsistency and self-contradiction in the sworn testimony of Neufeld at deposition in Winnipeg, Canada, and at trial in New York (Brief, Docu. No. 96, at 11-12, Brief, Docu. No, 102, pp. 4-6).

In spontaneous, unrehearsed sworn testimony at deposition in Winnipeg Neufeld did not remember his purported suggestion

of price (Depo., Docu. No. 87C at 33-34).

Neufeld's sworn testimony at trial is conflicting. Counsel used an improper leading question to get Neufeld to state that Schubert agreed to the purported suggested procedure, Rule 611(c), Federal Rules of Evidence, (Trans., Docu. No. 107 p. 158).

Evidence in the record supports denial by Schubert that he discussed or agreed to the procedure which Neufeld purportedly advised in the transactions in suit (Depo., Docu. No. 87E at 15-20, Brief, Docu. No. 102 at 2-17, Trans., Docu. No. 107 at 7-9, 14, 33-34).

In repeated sworn testimony, Neufeld, at deposition in Winnipeg and at trial in New York, stated that Schubert never sought or accepted his advise (Depo., Docu. No. 87C at 27, 34, 56, 60, 68;

Trans., Docu. No. 107 at 76-77, 150).

The Second Circuit sanctions refusal of the District Court to hear the negligence issue in this case, Rules 103(a), 401-402, Fed. R. Evid. (Trans., Docu. No. 107, at 61-68, 99-101, 109-110, 214-231).

The Second Circuit Appellate Court opinion that the function of the Richardson New York Corporation was ministerial in executing the transactions at issue conflicts with Commission Notice of December 23, 1976, which requires the exercise of due diligence in executions on the trading floor (Notice, App. at A-3, 24-25).

Schubert amended his Complaint once as a matter of course, and once by leave of Court without motion before filing of responsive pleadings, Rule 15(a), FRCP (Complaints, Docs. Nos. 1, 2, 3).

REASONS FOR GRANTING THE WRIT

I. THE JUDGMENT OF THE SECOND CIRCUIT IN RESPECT TO INTERPRETATION OF THE PUBLIC INTEREST STANDARD IN THE STATUTE DISREGARDS LEGISLATIVE INTENT AND CONFLICTS WITH THE STATE COMMON LAW.

A. THE EXCHANGE HAS A LEGAL DUTY TO REGULATE THE FAIR PRACTICE OF ITS MEMBERS OFF THE TRADING FLOOR.

The finding of the Second Circuit Court that the Exchange has neither right nor duty to regulate relations between brokers and their customers off the Exchange trading floor (Opin., App. p. A-3, A-10-13) does not address the issue. The issue is the proper regulation by the Exchange of member business practice, in the interest of fair dealing with the public, off the

trading floor of the Exchange, pursuant to the Act.

The requirement derives from the common law rules of contract and agency. It was made a part of the Commodity Exchange Act in the public interest standard, specifically for commodity exchanges in Sec. 5(g), 7 U.S.C. Sec. 7(g) (Brief, Docu. on App. No. 114, at 2-5).

The requirement is recognized by the Commission in Notice of December 23, 1976, and codified in the Commerce Clearing House Commodity Futures Law Reporter in Para. 6135.50 at 6076. These authorities state that contract markets are required by the Commodity Exchange Act, Sec. 5(b), to adopt and enforce rules to insure that members including futures commission merchants deal fairly with the public (Notice, App. at A-25).

A well-founded judicial interpretation of the public interest standard in Sec. 5(g) of the Statute is of importance to producers, traders and consumers of commodities in interstate commerce. The opinion of the Court in this case, CCH Comm. Fut. L. Rep. Para. 21,476 at 26,231, is in conflict with Commission Notice of Dec. 23, 1976, supra, and with the common law (App. at A-10-13), Brief, Docu. No. 96 at 35-40).

The Exchange does not in fact regulate and enforce member practice off-Exchange. Counsel so states in Brief on Appeal dated January 10, 1985, at 9-10, and in Brief, Docu. on Appeal No. 16 at 5-7.

By its failure in Judgment of March 25, 1985, to confirm the duty of the Exchange to regulate member fair practice, the Second Circuit is in conflict with the

rules of agency and contract in the common law, and with the legislative intent in the Statute to assure fair business practice in the public interest in commodity futures trading (Brief, Docu. No. 114 at 3-4).

The issue of fair dealing in commodity trading was addressed by the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, in its investigation and report, "Commodity Investment Fraud", Senate Report No. 97-495 of July 13, 1982. The Subcommittee concluded, Report at 52 (Brief, Docu. No. 114 at 15-16):

> "In the past five years commodity futures trading has grown enormously. . . . As a result commodity fraud has grown to epidemic proportions, worth hundreds of millions of investors

dollars being lost each year. . ."

The issue of Exchange regulation of the practice of its members, thus, is a substantial Federal question of scope and importance.

B. BY ITS REFUSAL TO ENFORCE THE PUBLIC INTEREST STANDARD, THE COMMISSION IS IN VIOLATION OF THE LAW, AND IS AMENABLE TO SUIT BY THE TORT CLAIMS ACT.

Section 5 of the Act authorizes the Commission to designate a board of trade a contract market when, and only when, the board of trade demonstrates its transactions will be in the public interest.

In the context of Section 5, the public interest requires the fair treatment of customers, and the exercise of due care by the

industry professionals in commodity transactions with the public. This is clear from the intent in the Committee Report, Senate Report No. 93-1131, August 29, 1974, p. 19; and in the Conference Report, Senate Report No. 93-1194, September 30, 1974, p. 36 (Brief, Docu. No. 114 at 3-4).

As a matter of policy the Commission does not enforce that requirement in the law. That is clear from Commission Notice of December 23, 1976, which states that the CFTC will not require contract markets to adopt fair practice rules (App. at A-25-26).

Therefore, the Commission is in violation of the Statute, and the failure of the Exchange to regulate the fair practice of its members off-Exchange is the natural and probable consequence of the failure of

the Commission to uphold the law, and a proximate and concurrent cause of the injury in suit.

The right of a citizen to bring suit under the Tort Claims Act for injury by a Federal agency acting in violation of statute is affirmed by this Court in Hataley v. United States, 351 U.S. 173, 76 S.Ct. 745, 752 (1956).

The issues of Governmental agency and contract in Larsen v. Domestic and Foreign Commerce Corp., 337 U,S. 682 (1949), cited by the Second Circuit Court, have no parallel in the regulatory and public interest issues in this case. Thus, Larsen is not appropriate to support finding of immunity for CFTC failure to comply with the law.

II. THE SECOND CIRCUIT SANCTIONS ERRORS OF FACT AND LAW WHICH COMPROMISE THE INTEGRITY OF THE COURT.

The right to conduct one's case in United States Courts is statutory. Schubert's conduct of his case in Federal Court is at the sufferance of the Court.

The concern of the Court, however, properly is for is the integrity of the Court. If the Court does not give a pro se litigant the objective fairness it gives a paid professional, as happened in this case, the Court and due process are compromised.

A. OPINION OF THE SECOND CIRCUIT APPELLATE COURT IN RESPECT TO AMENDMENT OF COMPLAINT CONFLICTS WITH OPINIONS OF OTHER CIRCUIT COURTS,

THE NEW YORK SUPREME COURT, AND WITH OPINIONS OF THIS COURT.

The finding of the Second Circuit that Schubert had twice been granted leave to amend his Complaint is clear error (App. at A-4).

Schubert amended his Complaint once as of course, pursuant to Rule 15(a), Fed. Rules Civ. Procedure, and once by leave before filing of responsive pleadings, discovery or hearings.

The Court cites Mooney v. Vitola, 435 F.2d 838 (1970), to support its refusal to allow Schubert to amend pleadings. In Mooney the Court dismissed with leave to replead. That was not done in this case. Mooney, therefore, is distinguishable from this case, and not a valid parallel.

Since filing Amended Complaints, Schubert

has discovered evidence of common law fraud, and security and commodity fraud, in the handling of his trades by Richardson.

Furthermore, Schubert has discovered evidence of statutory violations by the Commission and by the Exchange in relevant regulatory duties; of Commission arbitrary and capricious construction of a relevant regulation, and of Exchange failure to enforce its rules, concurrently causing the injury in suit.

The letter of Rules 1 and 15 FRCP provides and the spirit requires, subject to restrictions not applicable to this case, that the Court allow clarification and particularization of the issues by amended complaint with view to trial on the merits.

The refusal of the Second Circuit Court to

allow a Third Amended Complaint is predicated on undue delay and prejudice to defendants (Opin., App. at A-14-15).

The Court gives no definition of prejudice and cites no prejudice, nor does it show the case will be delayed by amendment.

Prejudice to defendants, in respect to the amendment of pleadings, is defined by the Supreme Court of New York in Rife v. Union College, 294 N.Y.S.2d 460, 481:

> "One cannot successfully claim prejudice when he has full knowledge of all the facts and an opportunity to present his theory of the case is allowed."

These conditions are met in all respects in this case.

In the State of New York delay in amendment to pleadings is found by the Supreme Court

to be a factor outweighed by the need for a fair trial on the merits, as the Court states in DeForte v. Allstate Insurance Company, 411 N.Y.S.2d 726 (1978) at 727:

> "A party may move at any time to amend or supplement a pleading and "leave should be freely given" (CPLR 3025(b))."

The New York Supreme Court confirms this opinion in Minasy v. Foster Wheeler Corporation, 224 N.Y.S.2d 622 (1962), and again in 50 New Walden, Inc. v. Federal Insurance Co., 241 N.Y.S.2d 128 (1963).

The refusal of the Second Circuit to allow Schubert to amend pleadings conflicts with opinions of other Circuit Courts: Garcia v. Bernabe, 289 F.2d 690 (1961, First Circuit); Lone Star Motor Import, Inc. v. Citroen Cars Corporation , 288 F.2d 690

(1961, Fifth Circuit); Espey v. Wainright, 734 F.2d 748 (1984, Eleventh Circuit).

The refusal of the Court to allow Schubert to amend pleadings conflicts with decisions of this Court: United States v. Hougham, 81 S.Ct. 13 (1860); Foman v. Davis, 371 U.S. 178 (1962); Conley v. Gibson, 78 S.Ct. 99 (1957).

Therefore, in respect to Schubert's claims in the common law, the refusal of the Appellate Court to allow amendment of Complaint is in conflict with the opinions of the Court of last resort in the State of New York.

In respect to Schubert's claims under Federal law, the decision of the Appellate Court is in conflict with other Circuit Courts and with decisions of this Court.

Therefore, the denial of amendment by the

Second Circuit is unfounded, at variance with the Federal Rules and with other court opinions, and should be reviewed for conformance to practice.

B. JUDGMENT THAT RICHARDSON ADVISED SCHUBERT AS TO PRICE AND THAT SCHUBERT AGREED IS CLEAR ERROR.

In Judgment entered into the trial record at the end of the trial, the Court found that Richardson "suggested to Schubert his sixteen contracts be sold at $2 above the previous day's high. Plaintiff agreed to this price. . ." (Trans., Docu. No. 107 at 296, App. page A-19).

That finding of the Court, that Richardson suggested and that Schubert agreed to prices, is the keystone of the Court's judgment of dismissal. Without it, the judgment of dismissal will not stand.

The purported Richardson suggestion and Schubert's purported agreement are alleged in Richardson letter of April 27, 1979, to Schubert, giving the Richardson version of events leading up to the commodity transactions at issue, on the morning of April 18, 1979 (Schu. Ex. No. 7, Rec. on App.).

Allegedly the letter was based on the statements of Richardson broker, Neufeld, made by Neufeld some days after the fact.

Schubert at that time in settlement letters, before a lawsuit was considered, immediately and positively disputed the Richardson allegation of a suggested and agreed price (Trans., Docu. No. 107 at 29, 37).

Schubert disputed suggestion, agreement, or discussion of price in sworn testimony at deposition in Winnipeg (Docu. No. 87E at 16-

17). Schubert consistently and positively denied any suggestion or agreement as to price in sworn testimony at trial (Trans., Docu. No. 107 at 8, 33-34).

The Richardson testimony in respect to the alleged suggestion and agreement on price is inconsistent and contradictory.

In sworn testimony at deposition in Winnipeg, Canada, in 1984, Richardson broker, Neufeld, does not remember the suggestion of price, attributed to him in the Richardson letter, nor does he remember Schubert's purported agreement. He must be shown the letter to refresh his memory (Depo., Docu. No. 87C at 33-34).

In sworn testimony in Winnipeg and at trial, Neufeld repeatedly states that Schubert never sought or accepted his advice (Depo., Docu. No. 87C at 27, 34,

56, 60, 68, Trans., Docu. No. 107 at 76-77, 150). Clearly this testimony is inconsistent with the Richardson allegation that Schubert agreed to Richardson advice to enter orders before the market opening at or near expected opening prices, when an upward price move was expected (Trans., Docu. No. 107 at 73, Depo., Docu. 87C at 27, 45-46).

Moreover, the procedure of entering orders to sell at or near expected opening prices in the face of an anticipated rally, before the market opened without seeing and forming a judgment of the market, is something no competent trader would consent to, and is not used by Richardson in its own similar trades, (Depo., Docu. No. 87C at 38, 52; Trans., Docu. No. 107 at 118-119).

Under oath at deposition in Winnipeg,

Neufeld gives testimony that conflicts with itself. He testified that he called Schubert after the market close on Friday, at the end of the week in question, to inform Schubert that he, Schubert, was under-margined. Later, in the same testimony, he testified that Schubert had ample security on deposit, and was not under-margined. Clearly this testimony is self-contradicting (Depo. Docu. No. 87C at 61, 70).

Neufeld testified that his recollection of events was clear and accurate (Depo., Docu. No. 87C at 26, 63).

Therefore, he was falsifying testimony.

In National Labor Relations Board v. Pittsburgh S. S. Co., 69 S.Ct. 1283 (1940) at 1285, this Court found:

"Thus, in the determination of liti-

> gated facts the testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next."

Therefore, the Richardson assertion of a suggested price, and of Schubert's agreement, purportedly based on the statements of the Richardson broker, Neufeld, is not credible.

Schubert testified that the purpose of the Neufeld call at the end of the week was to urge him to repurchase some of his futures contract sales, (Depo., Docu. No. 87E at 21).

Neufeld is compensated by Richardson solely on commissions. Thus, it was to his profit to encourage trading activity in Schubert's account (Trans., Docu. No. 107 at page 101).

This Court addressed the issue of credibility in Texas & P. R. Co. v. Carlin, 23 S.Ct. 585 (1903) at 588:

> "At any rate, no man is an absolutely disinterested witness where his testimony relates to the question of the performance or nonperformance of a duty which he owed on account of the position which he occupied."

The finding of the Second Circuit Court that Schubert and Richardson agreed on the prices in the commodity transactions at issue is a clear and unconscionable error.

C. THE FAILURE OF THE COURT TO TRY THE NEGLIGENCE ISSUE IS AN ERROR OF LAW AND DENIES A FAIR TRIAL

The refusal of the District Court to try the negligence issue, because ". . . the complaint states, if anything, a breach of

contract claim, rather than a tort cause of action.", is an error of law (Brief, Docu. No. 77 at 1-3; Opin., App. at A-7, 9).

At trial the Court turned away witnesses prepared to give testimony relevant to negligent conduct in the executions of the transactions at issue. They were refused because the Court ruled Schubert did not allege negligence in his Complaint (Trans., Docu. No. 107 at 214-215, 221-231).

Schubert's case in negligence is based on the duty of fairness stated for fiduciaries in the New York common law, Bayer v. Beran, 49 N.Y.S.2d 2, 5, 7 (1944), Kenny v. Glenny, 240 N.Y.S. 713, 716, 717 (1930).

The duty of fairness of a commodity dealer

in industry practice, including Richardson, stated in Commission Notice of Decemmer 23, 1976, requires that a dealer exercise due diligence in order handling, executions, and in all the activities he carries out in behalf of a customer (App. at A-24-25).

The duty is the same as that for securities dealers, based both on the fiduciary relation, and on representations of trust and fair dealing implied by a dealer who solicits or accepts customers, under the "shingle theory" (Brief, Docu. No. 96 at 12-13).

Therefore, the refusal of the Court to hear Schubert's case in negligence omits an important part of the case, and denies a fair trial on the merits.

In final judgment the trial judge, Chief

Judge Motley, found for the record that the basic problem with the case had been that Schubert had represented himself throughout the proceedings (App. at A-18).

Judge Motley does not state Schubert's injury to fact and law, but it is clear in the record that the Court has of itself made critical errors in its findings of fact and conclusions of law.

In Opinion of Sept. 26, 1982, the Court treats the negligence cause of action in the case as an issue raised under the Commodity Exchange Act (App. at A-7-12).

When Schubert pointed out (Brief, Docu. No. 77 at 1-3) that the Complaint alleged negligence in the common law, the Court found that Schubert was attempting to change his cause of action (Opin., App. at A-16).

Schubert, in fact, alleged common law negligence from the onset of the case (Complaints, Docs. Nos. 1, 2, 3, Rec. on App.).

In Opinion of Sept. 24, 1982, the Court found, "Plaintiff alleges that his instructions were "negligently" disregarded (Second Amended Complaint, Para. (q), but his complaint actually alleges a breach of contract." (App. at A-7).

In Second Amended Complaint, Para. (q), Schubert alleges that Richardson:

1. "in total disregard of the market prices for the day carelessly and negligently entered unjustifiably low price offers at a neglectfully premature time in behalf of the plaintiff,"

2. "without consultation with the

plaintiff,"

3. "prior to the opening of the market,"

4. "without first checking the market trend,"

5. "and without taking into consideration the volatile character of the gold market of the preceding days, when price swings of more than $5.00 occurred numerous times."

None of these allegations in Para. (q) refer to a contractual agreement. They refer to the duty of a commodity broker to look to the interests of his customer, to exercise due care in his executions, with a view to market conditions, as a broker would if acting for his own account, and as Richardson does when trading for its own account (Trans., Docu. No. 107 at 118-119).

That duty of care, imposing on brokers the obligation to act with concern for the market, as they would if trading for their own account, is expressed in Rule G-18 "Execution of Transactions" of the Municipal Securities Rulemaking Board, quoted in Para. (s) of the Complaint.

The Second Circuit Court affirmed final Judgment that, "Mr. Neufeld has had at least eighteen years' experience in the sale of securities and commodities, and is an experienced and trained securities and commodities dealer." (App. at A-20).

Neufeld testified in Winnipeg he does not know what a fiduciary is, and is not aware of his fiduciary duty (Depo., Docu. No. 87C at 4-5).

He gave the same testimony at trial in New York some three months later (Trans.,

Docu. No. 107, p. 103).

At trial Neufeld testified that he executes the majority of his commodity trades on United States exchanges, a major fraction of them in New York (Trans., Docu. No. 107 at 103-104).

The law in New York is specific as to fiduciaries, Bayer v. Beran and Kenny v. Glenny, supra (Brief, Docu. No. 96 at 18-23).

Richardson, thus, by its broker, Neufeld, has in brokered transactions in the State of New York, for a period of years, acted in a fiduciary capacity without knowing or taking any interest in that fact, or in the responsibility it entails.

Therefore, the record shows several commodity transactions of appreciable size and importance to an American customer,

executed on a New York exchange by a Canadian broker, without the authorization of his customer, in an improper and careless manner, which the broker testified he would not use if trading for his own account. The record shows the Commission regulations allowed him to act in a careless manner, although he was clearly in violation of the rules of contract and agency in the common law, and shows the Exchange of which he was a member took no interest in his improper conduct.

None of these facts, clear in the record, showing negligence figure in the judgment of the Second Circuit Court of Appeals. Thus, this case did not receive a proper review on the merits.

CONCLUSION

For the foregoing reasons, this Court is respectfully requested to grant a writ of certiorari in this case.

Respectfully submitted,

June 17, 1985

Anthony R. Schubert
120 West 5th Avenue
Hutchinson, Ks. 67501
(316) 663 4553

APPENDIX

UNITED STATES COURT OF APPEALS

Second Circuit

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of March, one thousand nine hundred and eighty-five.

Present:

HONONABLE IRVING R. KAUFMAN,
HONORABLE THOMAS J. MESKILL,
Circuit Judges,
HONORABLE LLOYD F. MACMAHON,
District Judge,
sitting by designation.

----------x

84-6270

ANTHONY R. SCHUBERT

Plaintiff-Appellant,

-against-

RICHARDSON SECURITIES OF CANADA, GEORGE T. RICHARDSON, Senior Partner, FRANK B. LAMONT, Partner, RICHARDSON SECURITIES, INC., COMMODITY EXCHANGE, INC., COMMODITY FUTURES TRADING COMMISSION,

Defendants-Appellees

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record for the United States District Court for the Southern District of New York, and was argued by counsel for appellees.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it is hereby affirmed.

Docket No. 84-6270

Page two

1. Schubert asserts that the evidence adduced at trial was insufficient to support the judgment of dismissal of the claim against Richardson Securities of Canada ("RSC"). We do not agree. After a careful review of the record below, we

believe there was ample evidence to support Chief Judge Motley's finding that RSC was fully and explicitly authorized to sell gold contracts for Schubert's account, and that the sales were properly executed.

2. Schubert also urges that his claim against Richardson Securities, Inc., ("RSI"), Commodity Exchange, Inc. ("Comex") and the Commodity Futures Trading Commission ("CFTC") were improperly dismissed. The claim against RSI was properly dismissed on the basis of the district court's finding that RSI played an insignificant and ministerial role in the challenged transaction. The claim against Comex failed to state a claim, as the complaint alleged no breach of a duty imposed upon the exchange pursuant to the Commodity Ex-

change Act, 7 U.S.C. Sec. 1 et seq. Finally the claims against the CFTC were properly barred by the doctrine of sovereign immunity, see Larsen v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949).

3. Schubert argues that the district court impermissibly denied his motion to amend his complaint, notwithstanding the fact that he had already been granted leave to amend his complaint twice before. In a situation such as this, we have held that a determination whether to grant leave to amend is within the sound discretion of the trial court, see Mooney v. Vitolo, 435 F.2d 838 (2d Cir. 1970), and we do not believe the able district judge abused this discretion.

4. Accordingly, the judgment of the district court is affirmed.

/s/ Irving R. Kaufman
IRVING R. KAUFMAN
/s/ Thomas J. Meskill
THOMAS J. MESKILL
/s/ Lloyd F. MacMahon
LLOYD F. MACMAHON

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases in this or any other court.

+ + + + + + + +

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTHONY R. SCHUBERT, Plaintiff, v.

RICHARDSON SECURITIES OF CANADA,
GEORGE T. RICHARDSON, Sr. Partner,
FRANK B. LAMONT, Partner,
W.H. LORNE ROLSTON, Partner,
RICHARDSON SECURITIES, INC.,
KENNETH FULLER, Manag. Partner,

NEW YORK COMMODITY EXCHANGE, INC.,
LEE BERENDT, President,

COMMODITY FUTURES TRADING COMMISSION,
JAMES M. STONE, Chairman, Defendants.

81 Civ. 2679 (CBM)

APPEARANCES

ANTHONY R. SCHUBERT
120 West 5th Avenue
Hutchinson, Kansas 67501
Plaintiff Pro Se

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Lamont, W.H. Lorne Rolston,
Richardson Securities, Inc., and
Kenneth Fuller

BAER, MARKS & UPHAM
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COMMODITY FUTURES TRADING COMMISSION
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Attorneys for Defendants
Commodity Futures Trading Commission
and James M. Stone

MOTLEY, Chief Judge

O P I N I O N

This is a case involving the sale of gold bullion, in which plaintiff alleges that the broker who sold the bullion acted contrary to the instructions given by plaintiff. In essence, plaintiff alleges that defendants sold too soon, so that his instructions were not followed, and that he suffered over $15,000 in damages. Plaintiff alleges his instructions were "negligently"

disregarded (Second Amended Complaint Para. q), but his complaint actually alleges a breach of contract. . .

Richardson Securities of Canada

Plaintiff's brokerage account was with defendant RSC, a Canadian partnership. In March, 1979, plaintiff opened a commodity trading account with RSC.

In April, 1979, plaintiff called RSC in Canada and initiated the transaction that gave rise to this litigation. (Second Amended Complaint, Para. c). Plaintiff alleges in his complaint that he instructed his broker "to watch the market for a rally, or upward move, of the price in the gold market, to form a broker's judgment of the best time and price at which to effect the sales, and to notify the plaintiff by telephone as to their judgment." (Second Amended Complaint Para. d). Plaintiff further

alleges that instead of doing what he requested, defendants sold the contracts prior to the opening of the market on April 18, 1979, at prices "unreasonably and unjustifiably low for the day." (Id. at Paras. f, g). Plaintiff seeks relief against RSC, three of its partners, RSI and its president. Defendants RSC and its partners George T. Richardson, Frank B. Lamont, and W.H. Lorne Rolston move to dismiss the action as to them for lack of personal jurisdiction and improper venue.

. . . Although plaintiff refers to defendants' "negligent" failure to comply with the contract, the court finds that the complaint states, if anything, a breach of contract claim, rather than a tort cause of action. . .

* * *

RSI and Kenneth S. Fuller

Defendants Rsi and Kenneth S. Fuller move pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the complaint as to them for failure to state a claim upon which relief can be granted.

* * *

The extent of RSI action in this case involves the purely ministerial act of taking an order from its trading desk to a floor trader of the Comex. (Aff. of Sweatman, Para. 12). That act was properly performed in the instant matter. . .

Accordingly, plaintiff's complaint as to Mr.Fuller is dismissed and RSI's motion for summary judgment is granted.

The Commodity Futures Trading Commission

Plaintiff is also suing the Commodity Futures Trading Commission, an independent

regulatory agency of the federal government . . . The court dismisses these claims for lack of subject matter jurisdiction. . . The only exception to sovereign immunity that plaintiff might possibly have availed himself of is the Federal Tort Claims Act, 28 U.S.C. 267 et seq. However, as plaintiff's action is based on the Commission's discretionary power to promulgate certain regulations, it is barred by 28 U.S.C. 2680(a) . . .

Comex

Mr. Schubert alleges a cause of action against Comex arising from RSC's failure to comply with his instructions on the ground that Comex "by its failure to exercise proper overview of brokerage practice, and to regulate business conduct of its members off the floor of the Exchange, does encourage broker practices of questionable ethics, and

does allow the use of its Exchange facilities for the conduct of commodity transactions of improper origin, thus contributing to the aforesaid breach by [RSC] and to the aforesaid damages to the plaintiff." (Complaint Para m.) Plaintiff also alleges that Comex is liable to him because of its failure "to establish in its Rules and to enforce adequate standards of fair practice for its members" . . .

The Commodity Exchange Act 7 U.S.C. Sec. 1-23 (1976), which governs the activities of contract markets such as Comex, imposes no duty on these markets to insure that brokers properly execute the orders of their customers where the execution of such orders did not involve manipulative or fraudulent conduct.

* * *

The focus of the act, then, is the pre-

vention of manipulative conduct which would act as a fraud on customers, rather than on the prevention of negligent conduct, or non-fraudulent contract breaches where no manipulative or fraudulent conduct is alleged.

* * *

There is no provision in the Act which requires or even authorizes boards of trade such as Comex to regulate the relationship between customers and brokers. This is within the jurisdiction of the Commodity Futures Trading Commission pursuant to its rule-making power. . . Thus, no duty has been placed upon Comex to regulate broker-customer activities so as to prevent negligence or mere breach of contract.

* * *

In short, plaintiff's complaint does not state a cause of action against Comex.

Accordingly, defendant's motion to dismiss pursuant to Rule 12(b)(6) is granted, and the complaint as to Comex is dismissed.

* * *

Dated: New York, New York
September 24, 1982

/s/Constance Baker Motley
CONSTANCE BAKER MOTLEY

\+ \+ \+ \+ \+ \+ \+ \+

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTHONY R. SCHUBERT, Plaintiff

-against-

RICHARDSON SECURITIES OF CANADA, GEORGE T. RICHARDSON, Senior Partner, FRANK B. LAMONT, Partner, and W.H. LORNE ROLSTON, Partner,
Defendants.

81 CIV. 2679 (CBM)

APPEARANCES:

ANTHONY R. SCHUBERT
120 West 5th Street
Hutchinson, Kansas 67501
Plaintiff Pro Se

MORGAN, LEWIS & BOCKIUS
101 Park Avenue
New York, New York 10178

MOTLEY, C. J.

MEMORANDUM OPINION

This action is before the court on defendant's motion to dismiss for lack of personal jurisdiction. Pro se plaintiff Anthony Schubert, moves to amend his complaint and the earlier opinion and order of this court dismissing several of plaintiff's claims, to compel answers to interrogatories, and to certify a question of law for interlocutory appeal. In addition, former third-party defendant, the Commodity Futures Trading Commission, has moved for a protective order.

* * *

II. Motion to Amend Complaint

Pursuant to Rule 15, Federal Rules of

Civil Procedure, plaintiff moves to amend his complaint in order to assert a claim for declaratory relief. As explained below, the motion is denied because an amendment would cause prejudice to defendant and undue delay.

* * *

Plaintiff has already amended his complaint twice. . . To allow plaintiff to file a third amended complaint would cause undue delay and prejudice to the defendant. In the interest of judicial efficiency and fairness, plaintiff's motion is denied.

II. Motion to Amend Opinion And Order of the Court

Plaintiff has moved, pursuant to Rule 52(b), Federal Rules of Civil Procedure, to amend the opinion and order of this court, which dismissed his actions against RSI,

Kenneth Fuller, managing partner of RSI, CFTC, and Comex.

Under the law of the case doctrine, courts will generally give continuing effect to a ruling made earlier in the same action. The law of the case controls absent a clear error of law on which the previous opinion was predicated. . .

* * *

Plaintiff also claims that the court improperly found that he based his claims on negligence under the Commodity Exchange Act. Plaintiff now states that his claim arises under common law negligence. Plaintiff essentially attempts to amend his complaint by changing his cause of action. Since the court denies plaintiff's motion to amend his complaint, this motion is denied as well. Furthermore, the court's finding that plaintiff's complaint alleges a breach of

contract is a legal conclusion and plaintiff has not demonstrated a clear error of law on which the court's decision was predicated. . . . Accordingly, plaintiff's motion is denied.

* * *

V. Certification of Question of Law for Interlocutory Appeal

Plaintiff requests this court to certify for interlocutory appeal, pursuant to 28 U.S.C. Sec. 1292(b) (1976), the issue of whether Comex is required to regulate and enforce fair business practice on the part of its members. The motion is denied.

* * *

Dated: New York, New York
October 26, 1983

SO ORDERED

/s/Constance Baker Motley
CONSTANCE BAKER MOTLEY

AFTERNOON SESSION

3 p.m.

THE COURT: What I have decided to do, gentlemen, is to dictate into the record at this time the Court's findings and conclusions with respect to this case.

* * *

The basic problem with this case with respect to getting it ready for trial, trying it, and the arguments throughout the trial, has been that the plaintiff, Anthony R. Schubert has represented himself throughout these proceedings.

* * *

Richardson Securities is the agent of Richardson Securities of Canada and, as such, follows the instructions of Richardson Securities of Canada with respect to executing trades. In short, the agent did not

exercise discretion with respect to any trade made by it on behalf of Richardson Securities of Canada, and it is undisputed that the contracts at issue here were traded on the New York Commodity Exchange.

* * *

The price for the sale of these contracts was agreed upon the morning of April 18 when Mr. Neufeld consulted his sources and discovered that the price of gold on the London market was something above $2 over the previous day's high. He then suggested to the plaintiff that his sixteen contracts be sold at $2 above the previous day's high. Plaintiff agreed to this price, and the order was immediately entered by Neufeld in accordance with the regular practice of defendants with respect to such orders. The orders were immediately and properly executed by the defendants' agent in New York.

* * *

The Court finds that Mr. Neufeld's testimony is credible and supported by other facts and circumstances in evidence. . . . Mr. Neufeld has had at least eighteen years' experience in the sale of securities and commodities, and is an experienced and trained securities and commodities dealer. His testimony throughout was consistent with respect to his dealings with Mr. Schubert and his conversations with Mr. Schubert regarding the sale of these securities.

Mr. Schubert called Mr. Neufeld later in the day of April 18 and said to Mr. Neufeld simply that in his opinion Mr. Neufeld was a good chartist but a poor tactician. He did not condemn Mr. Neufeld for failing to follow his instructions with respect to the sale of the contracts.

On April 28 the plaintiff wrote a let-

ter to Mr. Jack Ellis, vice president of Richardson Securities, and pointed out that in his discussions with Mr. Neufeld on April 18 there was no discussion of price. . .

On May 3, 1979, the plaintiff wrote to Mr. W.H.L. Rolston, of Richardson Securities, concerning his dealings with Mr. Neufeld, and there he confirms, in essence, Mr. Neufeld's testimony. The third paragraph of that letter reads as follows:

"As to the protracted discussion during my call to Mr. Neufeld at about 8:10 a.m. April 18, concerning Mr. Neufeld's discretionary power, time he had for watching the market, his suggestions concerning offering prices in relation to the previous day's close, advise to offer $2 over these prices and hope for a fill, none of these ever took place. There was in fact no discussion of price whatever. . ."

* * *

The motion to dismiss the plaintiff's case for failure to prove his claim is therefore granted, and the complaint is dismissed.

\+ + + + + + + +

New Developments 21,287

* * *

[Para. 20.242] . . . Trading Standards for Floor Brokers and Futures Commission Merchants.

Commodity Futures Trading Commission. December 23, 1976. (41 F. R. 56134). Notice in full text.

* * *

Contract Markets--Rule Enforcement--Affirmative Action Required--Dual Trading

Regulations.--The broad rule enforcement obligations imposed upon contract markets by Sec. 5(a)8 of the Commodity Exchange Act, and Regs. Secs. 1.51 and 1.53, require the maintenance of an aggressive "affirmative action" program which includes, at a minimum, extensive floor surveillance and frequent investigations into the trading patterns of members for the purpose of detecting rule violations. While customer complaints may help in focusing such activities, solely responding to such complaints with no additional iniatives can not, in most instances, fulfill the rule enforcement requirement. The statement regarding rule enforcement was in response to certain comments regarding the dual trading regulations, which cited practical difficulties in enforcing certain of the new requirements, particularly one aimed at preventing prearranged trades.

See Para. 6420, "Contract Markets" division, and Para. 12,925, "Liabilities--Prohibitions" division.

Floor Brokers--Futures Commission Merchants--Due Diligence--Best Execution--Implicit Obligations.--Although previously proposed regulation Sec. 155.2 would have required that contract markets adopt rules providing that floor brokers use due diligence to execute customer orders at the best possible price, and that futures commission merchants use due diligence in handling orders of another to assure best execution, the Commission determined not to include the requirement in Regs. Secs. 155.2 and 155.3, as adopted, since such standards are under consideration as part of general customer pretection rules being developed by the CFTC staff. However, apart from any Commission or contract market rule, the CFTC believes

that floor brokers and FCM's are subject to strict due diligence standards, in that they are implicitly obligated by virtue of their relationship to customers "to exercise due diligence in not only order handling and executions, but in all of the activities they carry out on behalf of their customers."

See Paras. 12,925 and 12,955, "Liabilities--Prohibitions" division.

Contract Markets--FCM Regulation--Fair Dealing--"Public Interest" Standard.--The "public interest" standard for contract market designation, which is contained in Section 5(g) of the Commodity Exchange Act, includes the obligation to adopt and enforce rules to insure that members, including futures commission merchants, deal fairly with the public. Reg. Sec. 155.3 imposes direct regulations on FCM's to prevent abuses in the relationship of FCM's and af-

filiated persons to customers, largely because of present inadequacies in the rule enforcement programs of many contract markets. At this time, the Commission will not require contract markets to adopt rules in this area. Self regulation in the form of a Title III association is a possible vehicle for assuming regulatory responsibilities in this area; the alternative to effective industry regulation is continuing and perhaps increasing direct government regulation.

See Para. 6135, "Contract Markets" division, and Para. 12,955, "Liabilities--Prohibitions" division.

* * *

Contract Markets--Price Change Register--Nearest Ten Seconds.--Effective June 13, 1977, all contract markets are

required to maintain a price change register capable of recording each change in price within ten seconds after such change pursuant to Reg. Sec. 1.35(h). The CFTC has concluded that monitoring systems which utilize an adequate number of pit or ring observers, or suitable electronic devices, would enable all contract markets to detect virtually all price changes almost instantaneously, even in the busiest markets and heaviest trading periods. However, the application of this regulation is not intended to be absolute, and no action is anticipated against a contract market for failure to comply when non-compliance consists solely of the failure to detect and report within ten seconds occasional and isolated changes during hectic trading periods. Contract markets are advised to initiate implementation of the necessary technology and procedural systems in sufficient

time so that they are operational by the effective date of the regulation.

See Para. 8701, "Report--Records" division, and Paras. 12,925 and 12,955, "Liabilities--Prohibitions" division.

* * *

AFFIDAVIT OF SERVICE

Reference: Schubert v. Richardson Securities of Canada et al., Case No. 84-6270

Petitioner in the above-referenced case certifies that his Petition in the Supreme Court of the United States for a Writ of Certiorari to the Second Circuit Court of Appeals dated June 17, 1985, has been served on Respondents as follows:

Solicitor General
Department of Justice
Washington, D. C. 20530

Kenneth M. Raisler, Gen. Couns.
Commodity Fut. Trad. Commission
2033 K Street, N. W.
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John Linsenmeyer, Esq.
Morgan Lewis & Bockius
101 Park Avenue
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Barry J. Mandel, Esq.
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805 Third Avenue
New York, New York 10022

Page 2 of 2

Petitioner further certifies that all parties required to be served in this proceding have been served by Certified Return Receipt United States Mail, deposited in the United States Post Office at the time of mailing to the Clerk of the Court.

Anthony R. Schubert
120 West 5th Avenue
Hutchinson, Kansas 67501
(316) 663 4553

SUBSCRIBED AND SWORN to before me on this 13th day of June, 1985,

ANNABEL A. MILLER
NOTARY PUBLIC
My Appt. Exp. 8-19-85
STATE OF KANSAS

No. 84-1988

Supreme Court, U.S.
FILED
JUL 24 1985
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

ANTHONY R. SCHUBERT, PETITIONER

v.

RICHARDSON SECURITIES OF CANADA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE COMMODITY FUTURES TRADING COMMISSION IN OPPOSITION

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Acting Solicitor General
Department of Justice
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KENNETH M. RAISLER
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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1988

ANTHONY R. SCHUBERT, PETITIONER

v.

RICHARDSON SECURITIES OF CANADA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE COMMODITY FUTURES TRADING COMMISSION IN OPPOSITION

Petitioner contends that he may recover damages against the Commodity Futures Trading Commission under the Federal Tort Claims Act on account of the Commission's alleged failure to protect the public interest.

1. Petitioner brought this action in the United States District Court for the Southern District of New York against the Commodity Futures Trading Commission and others, seeking more than $300,000 in damages in connection with transactions in gold futures contracts that Richardson Securities of Canada (RSC) had executed on the Commodity Exchange for petitioner's account. He alleged in a second amended complaint that RSC failed to execute his instructions properly by selling his futures contracts prematurely, causing him to lose money. The Commission, petitioner claimed, contributed to his loss by failing to require commodity exchanges to formulate and enforce adequate

standards of ethical practice and by failing to enforce certain ethical standards for commodity brokers.

The district court dismissed the action against the Commission for lack of subject matter jurisdiction because sovereign immunity has not been waived to permit a suit for damages against the Commission (C.A. App. 17-20).[1] The district court also dismissed the action against the Commodity Exchange and a subsidiary of RSC and various individuals, but denied RSC's motion to dismiss for want of jurisdiction pending discovery (*id.* at 11-23).[2] The court later denied petitioner leave to amend his complaint for a third time, reasoning that the amendment would prejudice RSC and cause undue delay, and that petitioner had failed to specify the nature of the additional relief he sought to add to his complaint (*id.* at 29, 35 n.1).[3] Following a bench trial, the district court entered judgment in favor of RSC (*id.* at 39-48).

The court of appeals affirmed in an unpublished judgment order (Pet. App. A1-A5; 762 F.2d 991 (Table)). The court of appeals held (Pet. App. A4) that petitioner's claim against the Commission was barred by sovereign immunity and that the district court did not abuse its discretion in denying petitioner leave to file a third amended complaint.

---

[1]The district court's opinion is reproduced only in part at Pet. App. A6-A14. It is reproduced in full at C.A. App. 11-23. A later opinion of the district court partially reproduced at Pet. App. A14-A18 may be found at C.A. App. 24-35. An opinion of the district court not reproduced in petitioner's appendix is at C.A. App. 36-38. Finally, the district court's findings of fact and conclusions of law, which are partially set forth at Pet. App. A19-A23, are reproduced in full at C.A. App. 39-48.

[2]The district court ultimately concluded that it had personal jurisdiction over RSC (C.A. App. 26-28).

[3]Petitioner's attempt to renew his motion without offering new supporting grounds was also denied (C.A. App. 36-38).

2. The decision of the court of appeals is plainly correct and does not conflict with the decisions of this Court or any other court of appeals. Further review is therefore unwarranted.

It goes without saying that, in the absence of a waiver of sovereign immunity, the Commission may no more be sued for damages than the United States itself. See, *e.g.*, *Army & Air Force Exchange Service* v. *Sheehan*, 456 U.S. 728, 733-734 (1982). Petitioner contends (Pet. 25-27) that the government has waived sovereign immunity to his damages action in the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671 *et seq*. This argument is utterly without merit. In the first place, the Commission is not a proper party to a suit under the Act. 28 U.S.C. 2679(a). Moreover, petitioner failed to exhaust his administrative remedies by presenting his claim to the Commission, a jurisdictional prerequisite to the Act's waiver of sovereign immunity. 28 U.S.C. 2675(a). Finally, petitioner's contention that the Commission failed adequately to regulate commodity brokers falls squarely within the discretionary function exception in the Act. 28 U.S.C. 2680(a); see *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, No. 82-1349 (June 19, 1984), slip op. 15 (footnote omitted) ("whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals").[4] For these reasons, petitioner's claim for damages against the Commission was properly dismissed.[5]

---

[4]Petitioner's reliance (Pet. 27) on *Hatahley* v. *United States*, 351 U.S. 173 (1956), is misplaced. There, government agents had committed trespasses in violation of state law — no discretionary functions involving the scope of an enforcement program were at stake (*id.* at 181).

[5]In any event, petitioner's argument (Pet. 26) that the Commission "[a]s a matter of policy * * * does not enforce" the public interest requirement set forth in Section 5 of the Commodity Exchange Act, 7

Petitioner's factbound contention (Pet. 28-34) that he should have been allowed to amend his complaint for a third time obviously does not warrant review by this Court. The district court's ruling was well within its discretion, especially in view of petitioner's failure to come forward with pleadings that would have cured the various defects in his complaint. See, *e.g.*, *Cape Cod Nursing Home Council* v. *Rambling Rose Rest Home*, 667 F.2d 238, 242 n.5 (1st Cir. 1981) (leave to amend properly denied where amendment would be futile).

U.S.C. 7, is erroneous. The Commission is authorized under Section 5(g) to designate an exchange as a contract market for the trading of futures contracts when the exchange demonstrates that the proposed trading "will not be contrary to the public interest." The Commission enforces the public interest requirement in the contract market designation process and through periodic exchange reviews. See 17 C.F.R. 1.41, 1.50-1.54; *Guideline on Economic and Public Interest Requirements for Contract Market Designation*, 47 Fed. Reg. 49832 (1982); 40 Fed. Reg. 25849 (1975); *Guideline on Contract Market Rule Enforcement Program*, 1975 Comm. Fut. L. Rep. (CCH) ¶ 6430; CFTC Ann. Rep. 78-80 (1984). The Commission's December 23, 1976 notice of adoption of Rule 155.3, 17 C.F.R. 155.3 (41 Fed. Reg. 56134), cited by petitioner (Pet. 22, 23, 26), does not support his argument. Rule 155.3 established minimum safeguards directly on all futures commission merchants, rather than on exchanges, because of inadequacies at the time in the enforcement programs of many exchanges. In light of its rule, the Commission found it unnecessary to require exchanges to adopt similar requirements. 41 Fed. Reg. 56138 (1976).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1985

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(3)

No. 84-1988

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

ANTHONY R. SCHUBERT

Petitioner

v.

RICHARDSON SECURITIES OF CANADA
GEORGE T. RICHARDSON, Sen. Partner
FRANK B. LAMONT, Partner
W. H. LORNE ROLSTON, Partner
RICHARDSON SECURITIES, INCORPORATED

COMMODITY EXCHANGE, INCORPORATED

COMMODITY FUTURES TRADING COMMISSION

Respondents

REPLY BRIEF

Of The Petitioner

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ARGUMENT

A. SUIT UNDER THE TORT CLAIMS ACT MUST NAME THE UNITED STATES AS DEFENDANT.

The Commission may not be sued in its own name under the Tort Claims Act, 28 U.S.C. Sec. 2679, Holmes v. Eddy, 341 F.2d 477, 480 (1965).

That point of law was known early in this case. By Motion and Brief, Docs. Nos. 18 and 20 page 6, Rec. on App., Schubert requested leave of Court to amend Complaint to remove the Commission and substitute the United States as defendant, as correction of an error within the purview of Rule 15, or by joining the United States and dropping the Commission pursuant to Rule 19, Federal Rules of Civil Procedure.

The Court disregarded Motion to Amend.

B. SCHUBERT HAS EXHAUSTED HIS ADMINISTRATIVE REMEDIES UNDER THE STATUTE.

By letter dated April 10, 1981, Schubert presented the claim in suit to the Commission, citing the Commission for negligence. By letter dated April 29, 1981, Mr. Thomas J. Loughran, Director, Division of Enforcement, CFTC, refused to consider the claim, and referred Schubert to Reparations procedures under the Act, Brief, Docu. No. 20, Rec. on Appeal, at page 17. Since Reparations procedures do not provide for claims against the Commission, but only for claims against registrants under the Act, and only for violations of the Act, and in as much as the Reparations procedure is not administrative, but judicial, Commission letter of April 29, 1981, is substantial denial of the claim. Thus, Schubert has exhausted his administrative remedies.

Fairchild, Arabatzis & Smith et al. v. Sackheim et al., CCH Comm. Fut. L. Rep. Para. 20,595 (S.D.N.Y., 1978), provides the doctrine of exhaustion of administrative remedies may be disregarded by the Court when administrative procedures made available by the Commission do not apply.

C. THIS SUIT ALLEGES COMMISSION FAILURE TO ENFORCE THE PUBLIC INTEREST STANDARD FOR THE EXCHANGE, SEC. 5(g).

In his July, 1985, Memorandum in Opposition, page 3, the Acting Solicitor General refers to the petitioner's contention that the Commission failed adequately to regulate commodity brokers.

The Commission duty of regulation under the Act applies to its registrants.

The regulation of Exchange members under the public interest standard in the Act, Sec. 5(g), is the duty of the Exchange.

The Commission and the Exchange, thus, have a concurrent regulatory responsibility, Brief, Docu. on Appeal No. 125.

Sec. 5 imposes on the Commission the duty of enforcement. The Statute allows no latitude as to whether the Commission enforces Sec. 5 provisions.

This suit alleges Commission enforcement failure under Sec. 5. It does not question under the Tort Claims Act the propriety of Commission action pursuant to Sec. 8a(5) and 8a(8), Motion and Brief, Docs. Nos. 119, 120, Rec. on Appeal.

Varig Airlines Does Not Support Commission Exemption under Tort Claims Act. The Acting Solicitor General cites United States v. Varig Airlines, 104 S.Ct. 2755, 81 L.Ed.2d. 660 (1984) to support his contention of Commission discretionary function exception in respect to the enforce-

ment issue, 7 U.S.C. Sec. 7(g), 28 U.S.C. Sec. 2680(a).

Varig Airlines bars a Tort Claims suit which challenges review by the Federal Aviation Administration of compliance with regulations regarding aircraft certification. The relevant provisions of the Federal Aviation Act provide for delegation of responsibility for the compliance review at issue, because of the volume of work in certification, 81 L.Ed.2d 670. There is no comparable provision in 7 U.S.C. Sec. 7.

The FAA was in compliance with the law; the Commission is in violation.

Thus, Varig Airlines is inappropriate to support the theory of Commission discretionary function exception in respect to its duty of enforcement, 7 U.S.C. Sec. 7(g), 28 U.S.C. Sec. 2680(a).

E. THE ACTING SOLICITOR GENERAL DISREGARDS THE INTENT OF THE LAW.

The overriding issue in this case is whether Schubert is entitled to due and reasonable care in the execution of his commodity trades on the Exchange; whether the Congress in drafting the Commodity Exchange Act intended that futures trades be conducted in accordance with principles of fair practice, or intended to give the Commission authority to maintain a free-for-all trading environment, with the odds, by the nature of the business, weighed in favor of the professionals.

The record shows the following:

a) Richardson did not exercise due care, defined in the common law of the State as the level of care a prudent individual gives his own trades, in the trades at issue, Santoro v. New York Cen-

tral Power Corporation, 72 N.Y.S.2d 12, 13 (1947), Trans., Doc. on App. No. 107 at 118-119;

b) The regulations of the Commission do not require the exercise of due care in executions, Commission Regulations under the Act, Reg. Sec. 166.2;

c) The rules of the Exchange do not require the exercise of due care off-Exchange, Brief, Counsel for the Exchange, Sept. 15, 1981, Docu. on App. No. 16 at 5-7, Brief on App., Jan. 10, 1985, at pages 9-10;

d) The public interest standard in Sec. 5(g) requires the Exchange to adopt rules requiring members to deal fairly with the public on and off-Exchange;

e) The duty of the Exchange to en-

force the fair practice of the members is supported in the common law. The doctrine of unjust enrichment prohibits the Exchange accepting the benefits of commodity trades of improper origin, Herweck's Paint and Wallpaper Co. et al. v. C. I. T. Corporation, 123 F.2d 989, 990 (5th Circ. 1941), County of Macon v. Shores, 97 U.S. 889, 890 (1877);

f) The law authorizes and directs the Commission to enforce the public interest standard for the Exchange, 7 U.S.C. Sec. 7(g);

g) The Commission does not enforce the public interest standard for the Exchange, Notice of Dec. 23, 1976, 41 F.R. 56134, CCH Com. Fut. L. Rep. Para. 20,242 at

21,287, Schubert Pet., June 17, 1985, at A-26-27, Commission Guideline on Economic and Public Interest Requirements for Contract Market Designation, 47 Fed Reg. 49832 (1982).

Intent is Shown in the House Floor Debate. Debate on the floor of the House of Representatives at the introduction of the bill, the Commodity Futures Trading Commission Act of 1974, H.R. 13113, by Congressman Poage of the House Committee on Agriculture, shows clear intent to insure that the Commission is responsive to the public interest, under the new law creating the CFTC, 120 Cong. Rec. 10767, April 11, 1974.

Intent is Indicated by the Wording. It is appropriate to look to the wording of the Statute to establish intent,

United States et al. v. American Trucking Ass'n, Inc. et al., 60 S.Ct. 1059, 1063 (1940).

The primary concern of the Commodity Exchange Act is for the public interest, 7 U.S.C. Sec. 5, Necessity for Regulation. It is the intent of the Statute that the concern for the public interest include fair business practice in trading, 7 U.S.C. Sec. 10a(8):

> ". . . to make and promulgate such rules and regulations . . . to protect the public interest and promote just and equitable principles of trade . . ."

Concern Is for Inadequate Enforcement. As expressed by the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs of the United States Senate, in Report "Commodity In-

vestment Fraud", No. 97-495, of July 13, 1982, the concern of Congress is to find a way to make the Commission more effective, Report at page 49:

> "The CFTC has been unable to stem the recent tide of commodity frauds, yet it systematically authorizes new areas of trading which may be subject to ever increasing fraud."

Guideline Shows Indifference to Practice. In footnote, pages 3 and 4 of Brief, the Acting Solicitor General cites Commission Guideline on Economic and Public Interest Requirements for Contract Market Designation, 47 Fed. Reg. 49832. The Guideline substantiates the statement in Notice of December 23, 1976, that the Commission does not enforce the requirement in the standard of Exchange adoption of fair practice rules for members. It states only economic purpose standards.

Rule 155.3 Does Not Fulfil 7 U.S.C. 5(g). The Solicitor cites Commission Reg. Sec. 155.3 as implementing Sec. 5(g). Reg. Sec. 155.3 imposes obligations not upon Exchange members but upon Commission registrants, in respect to proprietary account trading, disclosure, and affiliated person trading.

The Solicitor adds that in light of Rule 155.3 the Commission found it unnecessary to require exchanges to adopt similar requirements.

Commission substitution of Commission rule-making for Exchange rule-making violates the Statute. While Reg. Sec. 155.3 in itself is excellent, it does not address fair practice in executions, comparably defined in the securities industry as the level of care a broker gives trades for his account, Compl. Para. (s).

Rule 155.3, thus, does not address the issue in this case, the exercise of due care, as defined and required by law.

Hatahley is a Case of Agency Action in Violation of the Law.

In footnote, page 3 of Brief of July, 1985, the Solicitor states Schubert's reliance on Hatahley v. United States, 76 S.Ct. 745 (1956), is misplaced since in that case government agents were in violation of state law.

The State law in question is the Utah abandoned horse statute. In Hatahley, Federal range agents, purporting to act under the State law, seized and disposed of horses belonging to Navajo indians. The Federal agents violated the Federal Range Code for Grazing Districts, under the Federal Taylor Grazing Act. The Federal Range Code requires that written

notice and order to remove the livestock be served on violators, 76 S.Ct. at 750.

The Court found the Federal agents failed to exercise due care within the meaning of the Tort Claims Act exception, 28 U.S.C. Sec. 2680(a), 76 S.Ct. at 752. No agency has discretion to flaunt the law. The Acting Solicitor's objection to Hataley, thus, is not consistent with the findings of the Court.

CONCLUSION

For the foregoing reasons, the Court is respectfully requested to grant writ of certiorari in this case.

Respectfully submitted,

August 2, 1985

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AFFIDAVIT OF SERVICE

Reference: Schubert v. Richardson Securities of Canada et al., Case No. 84-1988

Petitioner in the above-referenced case certifies that his REPLY BRIEF of August 2, 1985, responding to Memorandum for the Commodity Futures Trading Commission in Opposition of the Solicitor General has been served on Respondents as follows:

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Petitioner further certifies that all parties required to be served in this proceding have been served by Certified Return Receipt United States Mail, deposited in the United States Post Office at the time of mailing to the Clerk of the Court.

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SUBSCRIBED AND SWORN to before me on this 2nd day of August, 1985.

Annabel A Milles

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NOTA
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STATE OF